UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRINKER INTERNATIONAL PAYROLL COMPANY LP, a limited liability partnership, Respondent, and THE SAWAYA & MILLER LAW FIRM Charging Party.	Case 27-CA-110765

RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

On July 25, 2014, Counsel for the General Counsel filed an Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge ("Answering Brief"). This Reply Brief addresses certain portions of that Answering Brief.

I. Counsel for the General Counsel's Position that the National Labor Relations Board Decision in *D.R. Horton*, Inc. Does Not Conflict with the Federal Arbitration Act and is Still Good Law.

On page 9 of the Answering Brief, Counsel for the General Counsel argues that the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) has not been overruled. Counsel for the General Counsel's position is flawed, as virtually every court in the country that has reviewed *D.R. Horton* has explicitly rejected the Board's decision. Indeed, as discussed on pages 6-10 of Respondent's Brief in Support of Exceptions, all five circuit courts that have reviewed *D.R. Horton* have refused to apply the Board's rationale, including the Fifth Circuit Court of Appeals which expressly rejected the Board's *D.R. Horton* decision. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Those circuit courts all ruled that *D.R. Horton* directly

conflicts with the provisions of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq*. Moreover, at least two NLRB Administrative Law Judges have flatly refused to apply the Board's *D.R. Horton* case when examining the lawfulness of mandatory arbitration agreements with class actions waivers. *Chesapeake Energy Corporation*, 2013 NLRB LEXIS 693 (2013); *Haynes Building Services LLP, et al*., 2014 NLRB LEXIS 94 (2014).

Interestingly, the Board had until Tuesday, July 15, 2014, to file an appeal of the Fifth Circuit's decision overruling *D.R. Horton*. Rather than filing a petition for certiorari with the United States Supreme Court, the Board chose not appeal. The logical conclusion to be drawn from this failure to appeal is that the Board is acutely aware their *D.R. Horton* decision is legally infirm. Rather than risk having *D.R. Horton* expressly overruled by the Supreme Court, the Board has chosen to delay the inevitable, as the overwhelming precedent discussed in Respondent's Brief in Support of Exceptions clearly demonstrates that *D.R. Horton* is slowly perishing and will be declared invalid in the near future. As such, it would be error for the Board to rely on its legally frail *D.R. Horton* decision in the current matter.

II. Counsel for the General Counsel's Erroneous Interpretation of the United States Supreme Court Decision in *Noel Canning*[1].

In discussing the appointment of NLRB Member Craig Becker, Counsel for the General Counsel alleges on page 11 of the Answering Brief that the United States Supreme Court in *Noel Canning* "held that such [recess] appointments are valid when an intra-session recess lasts at least 10 days." Counsel for the General Counsel's interpretation of *Noel Canning* is simply incorrect, as an exhaustive review of the 108 page opinion reveals no language indicating that an intra-recession recess lasting 10 days or longer is presumptively valid.

[1] *Noel Canning v. NLRB*, 134 S.Ct 2550 (June 26, 2014)

Respondent acknowledges the *Noel Canning* Court held that "a recess lasting less than 10 days is presumptively too short." Id. at 2567. However, as Justice Scalia points out in his concurring opinion, the majority opinion is silent regarding whether appointments made during recesses in excess of ten days are valid. To illustrate, Justice Scalia states as following:

> As for breaks of 10 or more days: We are presumably to infer that such breaks do not trigger any "presumpt[ion]" against recess appointments, but does that mean the President has an utterly free hand? Or can litigants seek invalidation of an appointment made during a 10-day break by pointing to an absence of "unusual" or "urgent" circumstances necessitating an immediate appointment, albeit without the aid of a "presumpt[ion]" in their favor? Or, to put the question as it will present itself to lawyers in the Executive Branch: Can the President make an appointment during a 10-day break simply to overcome "political opposition in the Senate" despite the absence of any "national catastrophe," even though it "go[es] without saying" that he cannot do so during a 9-day break? Who knows? The majority does not say, and neither does the Constitution.

Id. at 2599.

As Justice Scalia correctly points out, the *Noel Canning* decision does not address whether an appointment made during a brief 17-day recess of the Senate, such as the appointment of Member Craig Becker, would be valid. Moreover, and more importantly, the *Noel Canning* opinion specifically mentioned that Member Becker's recess appointment was currently being challenged by multiple petitions for certiorari. However, instead of discussing his appointment and clarifying the issue, the Court consciously chose not to analyze the validity of Member Becker's appointment. *Id*. at 2558.

For these reasons, Respondent maintains that Member Becker's appointment was invalid. As such, the Board lacked a valid quorum at the time the *D.R. Horton* decision was issued, and Respondent's Exceptions 12 and 13 should, therefore, be granted.

III. The Counsel for the General Counsel's Improper Characterization of Respondent's Agreement to Arbitrate as a "Work Rule" for Purposes of the 10(b) Analysis.

On page 14 of the Answering Brief, Counsel for the General Counsel once again refers to Respondent's Agreement to Arbitrate as a "unilaterally implemented work rule." As set forth in detail in Respondent's Exceptions and the corresponding Brief, the Agreement to Arbitrate is not a "work rule." To the contrary, as its names connotes, the Agreement to Arbitrate is a binding bilateral agreement between the employee and the Respondent.

Interestingly, none of the decisions cited by the Administrative Law Judge ("ALJ") or the Counsel for the General Counsel analyze or explain why a binding legal contract is treated as a "work rule" when calculating the statute of limitations pursuant to Section 10(b). (ALJD 5: 31-39) In fact, the decisions cited by the ALJ simply assume, without analysis, that a binding arbitration agreement should be treated as a policy or work rule when determining whether allegations challenging the legality of such an agreement are timely.

Respondent maintains that its Agreement to Arbitrate is a binding legal contract that was executed with the Charging Parties in June 2012. Because the Agreement to Arbitrate is a bilateral contract, and not a work rule, the six-month statute of limitations began to run at the time the contracts were executed. Neither the ALJ nor the Counsel for the General Counsel has cited any specific authority to the contrary. Thus, Respondent reiterates that Exceptions 14-17, 27, 35, 48 and 50-53 should be granted.

IV. Counsel for the General Counsel's Failure to Include an Allegation in the Complaint that Respondent Violated the Act Because its Employees Would Reasonably Believe that the Agreement to Arbitrate Bars or Restricts Them From Filing Charges with the National Labor Relations Board.

Exceptions 20, 22-26, 28-35 and 54 contend the ALJ erred by concluding that Respondent's employees would reasonably believe the Agreement to Arbitrate restricts them from filing charges with the Board because the Complaint failed to include any specific

allegations to that effect. On pages 15-17 of the Answering Brief, Counsel for the General Counsel attempts to refute those Exceptions by pointing out that: (a) portions of the Agreement to Arbitrate were recited in the Complaint; and (b) paragraph 5 of the Complaint included a broad statement that Respondent's actions violated Section 8(a)(1) of the Act.

Respondent acknowledges that significant portions of the Agreement to Arbitrate were included in the Complaint, and the Complaint included a blanket statement alleging that Respondent violated Section 8(a)(1) of the Act. However, those general allegations do not satisfy the Board's procedural requirements, as Section 102.15 of the Board's Rules and Regulations clearly states that a Complaint "shall contain . . . (b) **a clear and concise description of the acts which are claimed to constitute unfair labor practices**, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." (Emphasis added) The Complaint in this case clearly fails to comply with that procedural requirement[2], as there is no language in the Complaint alleging that Respondent's Agreement to Arbitrate violates the Act by barring or restricting employees from filing charges with the Board. As such, Respondent maintains that Exceptions 20, 22-26, 28-35 and 54 should be granted based on the procedural deficiency discussed above, along with the legal grounds analyzed in Respondent's Brief in Support of Exceptions.

V. Counsel for the General Counsel's Incorrect Argument That Respondent Did Not Include Specific Exceptions That Were Argued in the Brief.

On page 18 of the Answering Brief, Counsel for the General Counsel states that:

> "Respondent argues, for the first time, that the fact that the Charging Party filed a charge with the Board 'provides solid evidence that the Agreement to Arbitrate

[2] To the extent the Counsel for the General Counsel is attempting to negate Respondent's arguments based on procedural grounds, the Counsel for the General Counsel should be held to the same standards of procedural compliance.

> does not bar or restrict employees from filing charges' with the NLRB. Respondent did not file an Exception alleging this."

This statement is completely false. To illustrate, Respondent's Exception 31 states as follows:

> The ALJ's failure to find/conclude that because Hickey, Gulden and Ragsdale, in fact, filed an unfair labor practice charge with the Board, they did not interpret the Agreement to Arbitrate as a prohibition on their right to file unfair labor practice charges or have access to the Board and its processes.

Despite Counsel for the General Counsel's assertion to the contrary, Respondent clearly included an exception asserting that Charging Party's filing of an unfair labor practice charge in this matter provides solid evidence that the Agreement to Arbitrate does not bar or restrict employees from filing charges with the NLRB. As such, Respondent's arguments to that effect should not be "disregarded" based on procedural grounds as urged by the Counsel for the General Counsel.

The fact remains that Counsel for the General Counsel has failed to identify any actual evidence to support the allegation that Respondent's Agreement to Arbitrate bars or restricts employees from filing charges with the Board. Therefore, Respondent reiterates that Exceptions 20, 22, 24, 25, 26 and 28-33 should be granted.

VI. Counsel for the General Counsel Misconstrues the "Illegal Objective" Exception In Bill Johnson's Restaurant, Inc.[3]

On page 20 of the Answering Brief, Counsel for the General Counsel argues that Respondent's Exceptions 36-42 and 54 should be denied based on a misreading of the "illegal objective" exception in footnote 5 of *Bill Johnson's*. *Id.* at 737. According to the Counsel for the General Counsel, the ALJ correctly ruled that Respondent's Motion to Compel Arbitration had an illegal objective pursuant to *Bill Johnson's*. Her theory is that a violation of any section

[3] *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731 (1983)

of the Act, in this case, 8(a)(1), constitutes an illegal objective that permits the ALJ's order and remedy involving a U.S. District Court action.

In *Bill Johnson's* and in a subsequent case, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002), the U.S. Supreme Court held that the Board could only issue remedies for non-NLRB litigation if that litigation was both (1) meritless and (2) retaliatory. *Bill Johnson's*, 461 U.S. at 747 ("[R]etaliatory motive and lack of reasonable basis are both essential prerequisites" to issuing a remedy regarding litigation). There is, however, an exception to this rule set forth in footnote 5 of the *Bill Johnson's* opinion: the NLRB may also issue remedies for litigation that is either preempted by the NLRA or "has an objective that is illegal under federal law." *Id.* at 737 n.5.

The general rule in *Bill Johnson's* allowing sanctions for meritless, retaliatory litigation does not apply here because there is no evidence that Respondent's Motion to Compel Arbitration was either meritless or retaliatory. Nor is this a case in which NLRA state-law preemption would apply, because Respondent is seeking to compel arbitration based on the FAA in federal court.

Thus, the only remaining *Bill Johnson's* exception is litigation in which the "objective is illegal under federal law." The phrase "objective that is illegal under federal law" must be narrowly interpreted to only include litigation intended to circumvent Board orders. In filing the Motion to Compel Arbitration, Respondent has not tried to circumvent any Board order, and the motion therefore does not have an unlawful objective.

Counsel for the General Counsel seems to erroneously press the Board to adopt a broader reading of *Bill Johnson's* exception for litigation with an illegal objective, but Counsel for the General Counsel's interpretation would impermissibly conflict with *Bill Johnson's* holding. In

Bill Johnson's, the Supreme Court decided whether the Board could remedy litigation "brought by an employer to retaliate against employees for exercising federally protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law." 461 U.S. at 733. The General Counsel issued a complaint alleging that an employer's lawsuit against an employee violated 8(a)(1) and 8(a)(4). *Id.* at 735. The ALJ and the Board agreed that the employer had violated 8(a)(1) and 8(a)(4). *Id.* at 735-37.

The Supreme Court held that, although 8(a)(1) and 8(a)(4) are broad and are intended to protect Section 7 rights, and even though there was no doubt that a lawsuit could be used by an employer as a powerful instrument of coercion or retaliation, coercion and retaliation alone were insufficient to permit a remedy. *Id.* at 740-41. "The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Id.* at 743. In other words, even though litigation activities can be undertaken with the express purpose of interfering with Section 7 rights and violating Section 8(a) of the Act, the Board is powerless to prohibit or sanction employers for engaging in such litigation activities except as allowed by *Bill Johnson's* exceptions.

If the phrase "objective that is illegal under federal law" is interpreted broadly to include any action that impairs rights under the NLRA, then the *Bill Johnson's* exception would swallow the *Bill Johnson's* rule. *Bill Johnson's* prohibits the Board from finding a violation of the Act even if an employer intended to infringe on Section 7 rights and violate 8(a). *Id.* at 743. Thus, *Bill Johnson's* exception for litigation with an "objective that is illegal under federal law" cannot be interpreted to allow the Board to prevent an employer from pursuing a motion to compel

arbitration, nor can it be interpreted to allow the Board to award fees and costs for any litigation that may adversely affect Section 7 rights.

As a result, even assuming arguendo that Respondent's filing of the Motion to Compel Arbitration violated Section 8(a)(1), a violation of Section 8(a)(1) alone cannot be construed as an "objective that is illegal under federal law." Because the Counsel for the General Counsel has not shown that Respondent violated *Bill Johnson's* prohibition against meritless and retaliatory conduct, nor that the Motion to Compel Arbitration is preempted or seeks an "objective that is illegal under federal law," it is unconstitutionally improper for the Board to interfere with the Respondent's Motion to Compel Arbitration in any way. Thus, it was improper for the ALJ to order Respondent to file a motion to vacate the U.S. District Court's Order granting its Motion to Compel Arbitration. Exceptions 36-42 and 54 should therefore be sustained.

Dated: August 8, 2014

Respectfully submitted,
JACKSON LEWIS P.C.

By: /s/ Ross M. Gardner

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CERTIFICATE OF SERVICE

I hereby certify:

I am employed in the County of Douglas, State of Nebraska. I am over the age of eighteen years and not a party to the within action; my business address is Jackson Lewis P.C., 10050 Regency Circle, Suite 400, Omaha, NE 68114.

On August 8, 2014, I served the within:

RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

on the parties and interested persons in said proceeding:

X by **first class mail** upon the following persons, addressed to them at the following addresses:

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Additionally, on August 8, 2014, I will electronically file the above-mentioned document with the National Labor Relations Board's Office of Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this 8th day of August, 2014, at Omaha, Nebraska.

/s/ Ross M. Gardner
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